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Tape Recording Made by Criminal Suspect Prior to Suicide Attempt and Delivered to Attorney Is Privileged

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is submitted that the *Curry* court strayed from its fundamentally correct premise. After concluding that the contributory negligence approach controls when the plaintiff's nonuse of an available seatbelt causes the accident,[217] the court added that, if the jury determines that the plaintiff was not contributorily negligent in failing to wear a seatbelt, the avoidable consequences approach of *Spier* must then be applied in order to reduce the plaintiff's recovery.[218] As the *Spier* Court itself recognized, however, its decision is not applicable to the situation in which the plaintiff's nonuse of an available seatbelt causes the accident.[219] In such cases, it is submitted, the contributory negligence approach alone is applicable. The troublesome aspect of the *Curry* decision is that although the court rationally concluded that contributory negligence, rather than avoidable consequences, is the correct approach when failure to use a seatbelt causes the accident, its holding seems to permit the jury to consider both.

Craig Noble Touma

Tape recording made by criminal suspect prior to suicide attempt and delivered to attorney is privileged

Private papers obtained by an attorney in the course of the attorney-client relationship[220] will be protected from discovery if

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[217] 89 App. Div. 2d at 8, 454 N.Y.S.2d at 315.

[218] *Id.* at 9, 454 N.Y.S.2d at 316. The court declared that "[i]n the event the jury determines that plaintiff's failure to wear a seatbelt did not constitute contributory negligence . . . , then under the general rule in *Spier* such conduct may still be considered in mitigation of damages." *Id.*

[219] 35 N.Y.2d at 451 n.3, 323 N.E.2d at 168 n.3, 363 N.Y.S.2d at 921 n.3; *see supra* note 192.

[220] New York has codified the attorney-client privilege at section 4503(a) of the Civil Practice Law and Rules, which provides:

> Unless the client waives the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication . . . .

CPLR 4503(a) (1963). At common law, an attorney could not disclose communications made to him in the course of his professional employment without his client's consent. 2 E. CONRAD, MODERN TRIAL EVIDENCE § 1082, at 257 (1956). This rule was intended to promote confidence and the free flow of information between a lawyer and his client so that legal problems would be more thoroughly analyzed and justice more effectively administered. *See id.*; C. MCCORMICK, *supra* note 163, § 87, at 175-76. The privilege afforded by section 4503(a) of the CPLR extends only to revelations made for the purpose of seeking a lawyer's

they would have been privileged had they remained in the client's possession.[221] The fifth amendment supplies one such privilege through its prohibition against compelled testimonial self-incrimination.[222] The United States Supreme Court has kept narrow the scope of fifth amendment protection,[223] however, by refusing to

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professional advice. *In re* Jacqueline F., 47 N.Y.2d 215, 219, 391 N.E.2d 967, 970, 417 N.Y.S.2d 884, 887 (1979). In order to meet this requirement, the holder of the privilege must be, or seek to become, a client, and the communication must be made to an attorney in his capacity as a lawyer; the communication must relate to a fact that the attorney was informed of by his client outside the presence of strangers, for the purpose of securing some legal assistance; the communication cannot be made for the purpose of committing a crime or tort, and the privilege must be claimed or is deemed waived. *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). *See generally* 8 J. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2290-2329 (J. McNaughton rev. ed. 1961).

[221] Fisher v. United States, 425 U.S. 391, 404-05 (1976); 2 E. CONRAD, MODERN TRIAL EVIDENCE § 1085, at 261 (1956). "Documents which come into existence as confidential communications between attorney and client are privileged." *Id.* Documents that existed prior to the inception of the attorney-client relationship, however, are not privileged unless they were privileged in the hands of the client and were transferred to the attorney under circumstances giving rise to the attorney-client privilege. 425 U.S. at 404-05; 8 J. WIGMORE, *supra* note 220, § 2307, at 592. A more rigorous rule would discourage a client from affording his attorney access to documents and tangible objects essential to obtaining the informed advice of counsel. 425 U.S. at 404. *See generally* Note, *The Attorney and His Client's Privileges*, 74 YALE L.J. 539, 539-52 (1965).

[222] The federal Constitution provides that "[n]o person shall . . . be compelled in any criminal case to be a witness against himself . . . ." U.S. CONST. amend. V. In early colonial America, the privilege against self-incrimination prohibited the physical, or moral, compulsion of damaging evidence from a person's own lips. Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763, 775-79 (1935); *see* 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2263, at 362-63 (3d ed. 1940). The concerns underlying the privilege were expounded in Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964):

> It reflects many of our fundamental values and noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses . . . and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

Id. at 55 (Goldberg, J.) (quoting Quinn v. United States, 349 U.S. 155, 162 (1955)).

A literal reading of the fifth amendment suggests that its sole application is to testimony sought from criminal defendants. The privilege, however, has evolved to include the testimony of a witness as well as that of the accused, Jolis v. Jolis, 142 N.Y.S.2d 309, 310 (Sup. Ct. N.Y. County 1955), and has been applied in civil cases, Haftel v. Appleton, 42 Misc. 2d 292, 296, 247 N.Y.S.2d 967, 971 (Sup. Ct. N.Y. County 1964), hearings and investigations by a grand jury, People v. Doe, 156 Misc. 304, 306, 280 N.Y.S. 508, 510 (N.Y.C. Gen. Sess. N.Y. County 1935), and numerous other types of hearings and investigations, *see* E. FISCH, *supra* note 163, § 686, at 387.

[223] *See infra* notes 224 & 262 and accompanying text.

shield evidence that is nontestimonial in nature.[224] Recently, in *In re Bronx County Grand Jury Investigation*[225] *(Vanderbilt),* the Court of Appeals held that a tape recording made by a criminal suspect prior to attempting suicide qualified as testimonial in nature for fifth amendment purposes and, consequently, the suspect's lawyer could not be compelled to surrender the tape to a grand jury.[226]

On January 3, 1982, Dr. Richard Rosen, a suspect in the investigation of an assault upon Clara Vanderbilt,[227] unsuccessfully attempted suicide.[228] While he was hospitalized, his wife found in their home, a cassette tape [tape 1] addressed to herself.[229] The surgical supervisor who worked with Dr. Rosen discovered a second tape [tape 2] in Dr. Rosen's desk.[230] Dr. Rosen's superior delivered tape 2 to Mrs. Rosen at her request,[231] whereupon she wrapped

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[224] *See* Fisher v. United States, 425 U.S. 391, 399 (1976); Schmerber v. California, 384 U.S. 757, 761 (1966); People v. Green, 83 Misc. 2d 583, 592, 371 N.Y.S.2d 271, 281 (N.Y.C. Crim. Ct. N.Y. County 1975). *See generally* 2 E. CONRAD, *supra* note 220, § 1111; E. FISCH, *supra* note 163, § 692, at 392-93; C. MCCORMICK, *supra* note 163, § 124, at 265; 8 J. WIGMORE, *supra* note 222, § 2263, at 363. On several occasions, the Supreme Court has addressed the question of whether certain compelled evidence is testimonial in nature. The leading case in this area is Holt v. United States, 218 U.S. 245 (1910), wherein the Court held that an accused's fifth amendment rights were not implicated by compelling him to don a blouse. *Id.* at 252-53. The *Holt* Court reasoned that the fifth amendment did not bar admission of the accused's own body as material evidence. *Id.* Similarly, in Schmerber v. California, 384 U.S. 757 (1966), the Court held that taking a blood sample over the petitioner's objection did not violate the privilege against self-incrimination. *Id.* at 761. Justice Brennan reasoned that the privilege bars testimonial evidence only, not noncommunicative real or physical evidence. *Id.* at 764. Significantly, *Schmerber* has been extended to exclude various attributes of a suspect from fifth amendment protection. *See, e.g.,* Gilbert v. California, 388 U.S. 263, 266-67 (1967) (voice exemplars); District Attorney v. Angelo, 48 App. Div. 2d 576, 579, 371 N.Y.S.2d 127, 130 (2d Dep't 1975) (handwriting exemplars); *accord* People v. Sallow, 100 Misc. 447, 464, 165 N.Y.S. 915, 924 (N.Y.C. Gen. Sess. N.Y. County 1917) (fingerprints).

[225] 57 N.Y.2d 66, 439 N.E.2d 378, 453 N.Y.S.2d 662 (1982).

[226] *Id.* at 70, 439 N.E.2d at 380, 453 N.Y.S.2d at 665.

[227] *Id.* On New Year's Eve, 1981, Clara Vanderbilt told a friend that Dr. Rosen had asked her to meet him at his hospital office. *Id.* Shortly thereafter, Ms. Vanderbilt was discovered outside Rosen's office, unconscious from a severe beating about the head. *Id.* Emergency medical attention prevented her death. *Id.*

[228] *Id.* By the morning of January 3, 1982, Dr. Rosen was aware that he was a suspect in the assault investigation. *Id.* After learning that Ms. Vanderbilt was expected to live, Dr. Rosen went to his office where he made a tape recording. *Id.* Later that evening, Rosen attempted to commit suicide in his home, but emergency treatment saved his life. *Id.*

[229] *Id.* at 71, 439 N.E.2d at 380-81, 453 N.Y.S.2d at 665. Although she did not listen to the recording, Mrs. Rosen spoke to Arthur Olick, a friend and an attorney, who advised her to ascertain whether her husband had left any other tapes. *Id.*

[230] *Id.* Dr. Rosen's superior searched Dr. Rosen's desk at Mrs. Rosen's request. *Id.*

[231] *Id.*

both tapes and deposited them with a friend.[232] When Dr. Rosen regained consciousness, he retained Jonathan Rosner as counsel.[233] Mrs. Rosen then retrieved the tapes from her friend and gave them to the attorney's son, who in turn delivered them to his father.[234]

Rosner initially refused to deliver the tapes in response to subpoenas duces tecum, and an ex parte court order, but, after a citation for contempt, he relinquished the tapes under seal to the New York Supreme Court.[235] After listening to the tapes, the trial judge quashed the subpoenas on the grounds of irrelevance.[236] The Appellate Division, First Department, rejected the finding of irrelevance and reversed, holding that the marital privilege protected tape 1,[237] but that no privilege attached to tape 2.[238]

On appeal, the Court of Appeals affirmed the ruling as to tape 1,[239] but reversed with respect to tape 2, holding that the doctor's fifth amendment privilege enabled his lawyer to invoke the attorney-client privilege on behalf of his client against production of the

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[232] *Id.*

[233] *Id.*

[234] *Id.* The sealed tapes were held by the family friend prior to being delivered to the attorney. *Id.*

[235] *Id.* at 71-72, 439 N.E.2d at 381, 453 N.Y.S.2d at 665-66. Rosner was served with two subpoenas duces tecum to compel production of the tapes. *Id.* Initially, Rosner refused to comply with either subpoena, claiming the marital, attorney-client and fifth amendment privileges. *Id.*

[236] *Id.* at 72, 439 N.E.2d at 381, 453 N.Y.S.2d at 666. In light of his finding of irrelevance, the trial judge did not reach the issue of privilege. *Id.*

[237] *In re* Vanderbilt, 87 App. Div. 2d 528, 528, 448 N.Y.S.2d 3, 6 (1st Dep't 1982). The appellate division concluded that the tape marked "Barbara" was intended as a confidential communication to Mrs. Rosen, and was made in reliance upon the marital relationship. *Id.* The court, however, permitted a scientific inspection of the tape for alterations in order to ensure its integrity. *Id.* at 529, 448 N.Y.S.2d at 6.

[238] *Id.* The appellate division held that tape 2 was not protected by any privilege, but it failed to give its reasons for so ruling. *Id.*

[239] 57 N.Y.2d at 74, 439 N.E.2d at 384, 453 N.Y.S.2d at 667 (1982). The district attorney argued that tape 1 was not privileged because, "as a suicide message, it was not intended to be received during the marriage and was made in contemplation of destroying it." *Id.* at 73, 439 N.E.2d at 382, 453 N.Y.S.2d at 666. The Court rejected this argument, stating that "the concern is whether the statement was made because of the marital relation." *Id.* at 73, 439 N.E.2d at 382, 453 N.Y.S.2d at 667 (citing New York Life Ins. Co. v. Ross, 30 F.2d 80, 81 (6th Cir. 1928)). Indeed, the Court observed that the focus of a suicide note might not be the break-up of a marriage, but rather an explanation of a suicide which was made in an "attempt to preserve the affection that gave rise to the marriage." *Id.* at 74, 439 N.E.2d at 383, 453 N.Y.S.2d at 667. The Court, however, reversed the ruling of the appellate division by extending the privilege so as to bar a scientific examination of the tape. *Id.* at 75, 439 N.E.2d at 384, 453 N.Y.S.2d at 667. The Court reasoned that erasures or deletions are "as much a part of the communication's 'substance' as are the statements actually made." *Id.*

tape.[240] Chief Judge Cooke, writing for the majority,[241] noted that evidence privileged in a client's hands remains privileged if it is given to an attorney in confidence and in order to obtain legal advice.[242] The Chief Judge then stated that because no one had listened to tape 2 prior to the attorney's receipt of it, the tape's message was confidential[243] and the attorney-client privilege attached, provided that Mrs. Rosen was acting as her husband's agent in delivering the tape to the lawyer.[244] Since the factual question of whether Mrs. Rosen was acting as her husband's agent had not yet been determined the Court remanded the case for a hearing on this issue.[245] Finally, the Court also held that Dr. Rosen's fifth amendment shield was intact,[246] since the incriminating[247] tape was testimonial in nature[248] and its compelled production implicitly would

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[240] *Id.* at 70, 439 N.E.2d at 380, 453 N.Y.S.2d at 665; *see infra* notes 241-48 and accompanying text.

[241] Chief Judge Cooke was joined in the majority opinion by Judges Jones, Wachtler, Fuchsberg and Meyer. Judge Jasen wrote a separate opinion in which he concurred in part and dissented in part. Judge Gabrielli took no part in the decision.

[242] 57 N.Y.2d at 76, 439 N.E.2d at 384, 453 N.Y.S.2d at 669; *see supra* note 221 and accompanying text.

[243] 57 N.Y.2d at 77, 439 N.E.2d at 384, 453 N.Y.S.2d at 669. The Court reasoned that an attorney-client privilege attached in connection with the delivery of tape 2 to Rosner because it was "uttered" only to the attorney for the purpose of rendering legal advice regarding the Vanderbilt investigation. The Court also noted that the district attorney failed to assert that anyone had heard the tape prior to its delivery to Rosner. *Id.* at 77 n.4, 439 N.E.2d at 384 n.4, 453 N.Y.S.2d at 669 n.4. Finally, the Court stated that a client actually must disclose, and not merely intend to disclose, the contents of a privileged communication in order to lose the privilege. *Id.* at 77, 439 N.E.2d at 384, 453 N.Y.S.2d at 668.

[244] *Id.* at 79-80, 439 N.E.2d at 386, 453 N.Y.S.2d at 670. The Court noted that in order for an attorney-client privilege to arise with respect to tape 2, Rosen must have made the communication to his lawyer. *Id.* Therefore, unless Mrs. Rosen delivered the tape to Rosner on her husband's behalf, she, not her husband, would have made the communication, and the tape's message would be unprivileged in Rosner's hands. *Id.*

[245] *Id.* at 79, 439 N.E.2d at 386, 453 N.Y.S.2d at 671.

[246] *Id.*, 439 N.E.2d at 385, 453 N.Y.S. 2d at 670. In Fisher v. United States, 425 U.S. 391 (1976), the Supreme Court indicated that in order for the fifth amendment privilege to attach to documentary evidence, the act of producing the document must result in "compelled testimonial self-incrimination." *Id.* at 399-400. The *Vanderbilt* Court found that all those elements were present in connection with the grand jury's subpoena of tape 2. 57 N.Y.2d at 79, 439 N.E.2d at 385, 453 N.Y.S.2d at 670; *see infra* notes 247-49 and accompanying text.

[247] The Court assumed, without explanation, that the contents of the second tape were incriminating. 57 N.Y.2d at 78, 439 N.E.2d at 385, 453 N.Y.S.2d at 669.

[248] *Id.* at 78-79, 439 N.E.2d at 385, 453 N.Y.S.2d at 669. The Chief Judge reasoned that evidence is testimonial if it "exposes the witness' mental state or thought processes." *Id.* at 78, 439 N.E.2d at 385, 453 N.Y.S.2d at 669. The Court concluded that a tape recording is "clearly testimonial" because it is an "aural record of the accused's communication." *Id.* at 79, 439 N.E.2d at 385, 453 N.Y.S.2d at 670.

authenticate the doctor's authorship of it.[249]

Judge Jasen concurred with respect to tape 1,[250] but concluded that no privilege had attached to the second cassette.[251] The dissent initially rejected the majority's finding that an attorney-client privilege attached to tape 2 based upon the attorney's receipt of it for the purpose of giving legal advice, since it was not established that the lawyer had ever listened to the tape.[252] Judge Jasen also questioned the confidentiality of the communication contained in tape 2, which was made for Dr. Rosen's colleagues, and not for his attorney.[253] Turning to the question of whether the fifth amendment privilege was applicable, the dissent compared the tape to business records to which others have access, and which consequently fall outside the ambit of fifth amendment protection.[254] Fi-

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[249] *Id.* The act of producing a document under compulsion is testimonial or communicative in that by doing so, one admits the existence and his possession of the document, and implicitly vouches for its authenticity. *See, e.g., Fisher,* 425 U.S. at 412 n.12. Under *Fisher, see infra* notes 262-66, in order to trigger the fifth amendment guarantee against self-incrimination, both the evidence sought and the act of production itself must be testimonial. *See* 425 U.S. at 409-11. In New York, the Court of Appeals also has stated that, under certain circumstances, the act of production implicitly authenticates the authorship and contents of documentary evidence. *See, e.g.,* People v. Copicotto, 50 N.Y.2d 222, 229, 406 N.E.2d 465, 470, 428 N.Y.S.2d 649, 654 (1980); People v. DeFore, 242 N.Y. 13, 27, 150 N.E. 585, 590 (1926); *accord* Grand Jury Subpoena Duces Tecum Served Upon John Doe, 466 F. Supp. 325, 327 (S.D.N.Y. 1979) (production of one's own papers is tantamount to admitting their genuineness). In *Vanderbilt,* Chief Judge Cooke concluded that Rosen's production of the tape would verify its authenticity. 57 N.Y.2d at 79, 439 N.E.2d at 385, 453 N.Y.S.2d at 670. Additionally, production would vouch for the circumstances surrounding the tape's preparation, its accuracy, and the conclusions to be drawn from it. *Id.* On the basis of these indicia, the *Vanderbilt* Court ruled that production of the second tape would be testimonial in nature. *Id.*

[250] 57 N.Y.2d at 80, 439 N.E.2d at 386, 453 N.Y.S.2d at 671 (Jasen, J., concurring in part, dissenting in part).

[251] *Id.* (Jasen, J., concurring in part, dissenting in part); *see infra* notes 252-55 and acompanying text.

[252] 57 N.Y.2d at 81, 439 N.E.2d at 387, 453 N.Y.S.2d at 671 (Jasen, J., concurring in part, dissenting in part). Judge Jasen noted that Rosner did not claim to have listened to the second tape in order to frame any legal advice. *Id.* (Jasen, J., concurring in part, dissenting in part). Hence, Judge Jasen stated, Rosner learned only of the tape's existence, a fact that was not a communication of a confidential nature. *Id.* at 81-82, 439 N.E.2d at 387, 453 N.Y.S.2d at 671 (Jasen, J., concurring in part, dissenting in part). The dissent concluded that the lawyer did nothing more than act as a "repository for potentially incriminating evidence." *Id.* at 82, 439 N.E.2d at 387, 453 N.Y.S.2d at 671 (Jasen, J., concurring in part, dissenting in part).

[253] *Id.* at 82-83, 439 N.E.2d at 387, 453 N.Y.S.2d at 672 (Jasen, J., concurring in part, dissenting in part).

[254] *Id.* at 84, 439 N.E.2d at 387-88, 435 N.Y.S.2d at 673 (Jasen, J., concurring in part, dissenting in part). In Bellis v. United States, 417 U.S. 85 (1974), the Supreme Court held that business records of a partnership fall outside the purview of fifth amendment protec-

nally, the dissent maintained, the record failed to establish that tape 2 was either incriminating or testimonial, and the majority therefore erred in assuming the existence of these two components of the privilege.[255]

On the peculiar set of facts presented, it is submitted that the *Vanderbilt* Court was correct in holding that the second tape recording was protected by the attorney-client privilege. Although the Court proceeded through its analysis in a somewhat abbreviated fashion,[256] its conclusion comports with prior constructions of the components of the attorney-client privilege.[257] The finding of confidentiality is viable because there was no evidence that anyone listened to the tape from the time it was made until the time it passed into the attorney's hands.[258] Less easily supported is the finding that the tape was communicated to the attorney in order to obtain legal advice. It is submitted, however, that the attorney did, indeed, render legal "advice," based upon the tape, by actively resisting the court's demand for production of such evidence.[259]

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tion because an individual does not have a sufficient private interest in shielding such records. *Id.* at 101. Judge Jasen analogized the second tape to business records since the tape was left for Rosen's medical colleagues, and was, therefore, not intended to be a private record. 57 N.Y.2d at 84, 439 N.E.2d at 388, 453 N.Y.S.2d at 673 (Jasen, J., concurring in part, dissenting in part).

[255] 57 N.Y.2d at 84-85, 439 N.E.2d at 389, 453 N.Y.S.2d at 674 (Jasen, J., concurring in part, dissenting in part).

[256] *See id.* at 76-77, 439 N.E.2d at 384, 453 N.Y.S.2d at 668-69.

[257] *See infra* notes 258-59 and accompanying text.

[258] *See* CPLR 4503(a) (1963); *supra* notes 220-21 and accompanying text. To invoke the attorney-client privilege, it must be established that the communication made to an attorney was confidential. CPLR 4503(a) (1963). Accordingly, communications made in the presence of third parties are not privileged. *See* People v. Boone, 51 App. Div. 2d 25, 379 N.Y.S.2d 181 (3d Dep't 1976). In *Vanderbilt*, the Court likened the tape to a letter contained in a sealed envelope, stating that a sealed letter's existence becomes known to those who hold it, but its contents and thus its communications remain undisclosed. 57 N.Y.2d at 77 n.5, 439 N.E.2d at 384 n.5, 453 N.Y.S.2d at 669 n.5.

[259] *See supra* notes 220-21 and accompanying text. Numerous cases have observed that the client transferred items to his attorney in order to secure legal advice. In Fisher v. United States, 425 U.S. 391 (1976), for example, the Supreme Court held that a client's papers, which were prepared by his accountant, were delivered to the attorney for purposes of obtaining legal advice with respect to a pending investigation by the Internal Revenue Service. *Id.* at 405; *see In re* Grand Jury Proceedings, 632 F.2d 1033, 1042 (3d Cir. 1980) (client transferred diary to attorney for purpose of receiving legal advice). Similarly, in *In re* January 1976 Grand Jury, 534 F.2d 719, 728-29 (2d Cir. 1976), the court remarked that when instrumentalities of a crime were given to an attorney, the client was intending to receive legal advice. It is clear, however, that a privilege does not attach in such a situation because fruits and instrumentalities of a crime are not privileged. *See In re* Ryder, 263 F. Supp. 360, 365 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967).

Therefore, evidence that the attorney actually listened to the tape does not appear to be essential, since it was not necessary to listen to the tape to render legal advice regarding its protection.[260] A contrary holding seemingly would undermine the policy favoring free disclosure between client and attorney.[261]

The *Vanderbilt* Court's resolution of the fifth amendment issue is, perhaps, more troublesome. The Court reasoned that both the tape and its production were inherently testimonial within the meaning of *Fisher v. United States*.[262] In *Fisher*, the Supreme Court limited the then prevalent "convergence theory," under which private papers were considered per se privileged,[263] holding that the fifth amendment shielded only compelled testimonial self-incrimination, and not private information per se.[264] The Court reasoned that since the documents were prepared voluntarily, only

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[260] *See supra* note 221. It should be noted that the attorney had control of the tape for less than a month before turning it over to the court. *See* 57 N.Y.2d at 71-72, 439 N.E.2d at 381, 453 N.Y.S.2d at 665-66. Presumably, he could have intended to listen to the tape at a later time for the purpose of preparing a defense.

[261] *See supra* note 221.

[262] 425 U.S. 391 (1976); *see* 57 N.Y.2d at 79, 439 N.E.2d at 385, 453 N.Y.S.2d at 670; *supra* notes 248-49 and accompanying text.

[263] *See infra* notes 264-66 and accompanying text. In 1886, the Supreme Court held that compulsory production of the defendant's private papers in order to use them against him was an unconstitutional search and seizure under the fourth amendment, and was equivalent to compelling him to be a witness against himself. Boyd v. United States, 116 U.S. 616, 633 (1886); *see* R. CUSHMAN, CASES IN CONSTITUTIONAL LAW 311 (5th ed. 1979). Indeed, the *Boyd* Court stated that

> any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other.

116 U.S. at 630. Subsequent to *Boyd*, the proposition that private papers are per se privileged under the fifth amendment had been reiterated numerous times. *See, e.g.*, Bellis v. United States, 417 U.S. 85, 87 (1974); Gouled v. United States, 255 U.S. 298, 306 (1921); Wilson v. United States, 221 U.S. 361, 377 (1911). The *Boyd* doctrine, however, had been subject to certain limitations prior to the *Fisher* holding. In 1913, for example, the Supreme Court held that a party may rely upon the fifth amendment in order to withhold self-incriminating evidence, but that he could not prevent a third party from producing it. Johnson v. United States, 228 U.S. 457, 458 (1913); *see* Couch v. United States, 409 U.S. 322, 328 (1973) (fifth amendment privilege is a personal privilege).

[264] *See* 425 U.S. at 401. The Court in *Fisher* was faced with the issue of whether an attorney possessing records prepared by his client's accountant could be compelled to surrender them. In ruling that the lawyer could be compelled to release the records, the Court stated that "the Fifth Amendment . . . truly serves privacy interests; but the Court has never . . . applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which . . . did not involve compelled testimonial self-incrimination of some sort." *Id.* at 399; *see supra* note 224.

the act of production would be compelled.[265] Left unanswered by *Fisher*, however, was the question of whether the compelled production of personally prepared private papers would violate the fifth amendment privilege.[266] A broad reading of *Vanderbilt* apparently suggests that it would, since the Court expressly stated that the tape and its production were inherently testimonial.[267] The value of the Court's decision in different factual contexts, however, is unclear. Specifically, the decision gives no indication of whether business or accounting notations recorded on tape also would be deemed "testimonial," or whether they more likely would be considered business records whose only testimonial aspects flow from the act of production.[268] It is submitted, therefore, that future determinations of whether the fifth amendment privilege attaches to tape recordings must necessarily be made on a case-by-case basis,

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[265] 425 U.S. at 410 & n.11. The Court concluded that the order for the personal records did not compel testimonial evidence because the materials existed prior to the issuance of the summons, did not contain the taxpayer's testimonial declarations, and were prepared voluntarily. *Id.* at 409-10. Thus, the Court noted, "the only thing compelled is the act of producing the document . . . ." *Id.* at 410 n.11 (citation omitted). The Court also stated, however, that the act of surrendering data had testimonial aspects regardless of the contents of the documents. 425 U.S. at 410.

[266] 425 U.S. at 414. The Court expressly stated that the issue of the case was not whether the fifth amendment would shield the taxpayer from producing his own private tax records. Subsequent to *Fisher*, many courts addressed the applicability of the fifth amendment to the situation in which private papers are sought from the accused. A number of these cases, however, apparently did not interpret *Fisher* to effect a change in the principle that private papers are protected. In *In re* Grand Jury Proceedings, 632 F.2d 1033 (3d Cir. 1980), for example, the Third Circuit held that an individual's pocket diaries were privileged under the fifth amendment. *Id.* at 1042. The court's rationale was based upon the premise that the "fifth amendment protects an accused from government-compelled disclosure of self-incriminating private papers . . . ." *Id.*; *see In re* Grand Jury Subpoena, 646 F.2d 963, 968 (5th Cir. 1981) (privilege extends to an individual's private books and records); United States v. Beattie, 541 F.2d 329, 331 (2d Cir. 1976) (*Fisher* does not alter the principle that the fifth amendment protects private papers); People v. Copicotto, 50 N.Y.2d 222, 229, 406 N.E.2d 465, 470, 428 N.Y.S.2d 649, 654 (1980) (dictum) (court could not compel production of purely private papers); *cf.* Briggs v. Salcines, 392 So.2d 263, 266 (Fla. Dist. Ct. App. 1980) (privilege protects a person from producing private tape recordings when compelled production would amount to forced incriminating testimonial communication).

[267] 57 N.Y.2d at 79, 439 N.E.2d at 386, 453 N.Y.S.2d at 670.

[268] It is submitted that, although the dissent properly criticized the majority for finding that tape 2 was "testimonial" in nature, the cases relied upon by Judge Jasen to support his criticism are distinguishable from the *Vanderbilt* situation insofar as they did not involve evidence that is communicative in nature. Indeed, the dissent cited cases, including Schmerber v. California, 384 U.S. 757 (1966), that deal with purely physical evidence. Nevertheless, with respect to tape recordings, it is suggested that courts should focus upon the question of whether the contents of the recordings truly are testimonial. In *Vanderbilt*, though, the Court ruled that the tape was testimonial by its very nature.

with due weight given to the communicative nature of the tape's contents.

It is further submitted that although the Court's conclusion as to the testimonial nature of the tape is questionable, the Court's rationale nonetheless may have precedential value with respect to the applicability of the fifth amendment privilege to private papers. The *Vanderbilt* rationale seemingly would extend fifth amendment protection to diaries, letters, and other private records because they are inherently communicative of the author's thoughts and ideas. Furthermore, the very production of such documents meets the *Fisher* testimonial standard, since their compelled production verifies the documents' existence, authorship and genuineness.[269] Thus, notwithstanding the demise of per se protection of private documents, it appears that the New York Court of Appeals has indicated that private papers often will fall within the purview of the fifth amendment's protection.

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[269] The *Vanderbilt* Court partly based its decision upon the fact that production of the tape would be the equivalent of vouching for its genuineness, admitting its existence, and expressing the author's belief that it was the article demanded in the subpoena. *See supra* note 249 and accompanying text.